QUESTION PRESENTED

Whether the Supreme Court of New Jersey correctly determined that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (also known as "Superfund"), which prohibited special State taxes only for the purpose of financing "claims which may be compensated" by Superfund, 42 *U.S.C.* § 9614(c), does not preempt the taxing provisions of the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.*, insofar as the State Spill Fund supported by the tax is used to finance claims either not covered or not actually compensated by Superfund?

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STATEMENT OF THE CASE

In 1977 the New Jersey Legislature adopted the Spill Compensation and Control Act ("Spill Act"), *N.J.S.A.* 58:10-23.11 *et seq.*, to protect the citizens and environment of the State from damage resulting from discharges of petroleum and other hazardous substances. To finance the spill prevention and cleanup program created by the Spill Act, the Legislature imposed a tax upon major petroleum and chemical facilities. *N.J.S.A.* 58:10-23.11h; *see also N.J.S.A.* 58:10-23.11b(l) for the definition of "major facility." The tax was levied on a per barrel basis for petroleum, and on either a per barrel or percentage of fair market value basis for hazardous substances. *N.J.S.A.* 58:10-23.11h. The Spill Act provides for the revenues generated by the tax to be credited to the Spill Compensation Fund ("Spill Fund") which is authorized to finance spill response and waste site cleanup costs incurred by the Department of Environmental Protection; certain damage claims resulting from hazardous discharges;[1] the personnel and equipment costs of the Department of Environmental Protection associated with the enforcement of the Spill Act; the administrative costs of the Spill Fund; and research concerning pollution and cleanup techniques, including ocean pollution. *N.J.S.A.* 58:10-23.11o. From 1977 through 1980, the Spill Fund provided the primary source of revenue for New Jersey's petroleum spill and hazardous waste cleanup program.

[1] The types of damage claims covered by the Spill Act are set forth in *N.J.S.A.* 58:10-23.11g(a) and include: 1) damage to personal or real property; 2) damage to natural resources; 3) loss of income or earning capacity due to damage to property or natural resources; 4) loss of tax revenue by a State or local government resulting from property damage for a period not to exceed one year; and 5) interest costs on debts incurred to remedy a discharge.

At the end of 1980, however, Congress recognized that states acting alone could not adequately address the staggering problems associated with the release of hazardous substances into the environment. Consequently, Congress adopted the Comprehensive Environmental Response, Compensation and Liability Act (known as the "Superfund Act" or "CERCLA"), 42 *U.S.C.* § 9601 *et seq.*, to assist the states in financing cleanups at the most severely damaged and highest priority sites throughout the nation. Funding for this federal effort was provided by a $1.6 billion trust fund to be raised by placing a tax on crude oil petroleum, and certain chemicals,[2] and by transferring to the fund appropriations from general federal revenues. The tax was structured to provide 87.5% of the fund, while general revenues were to make up the balance. The federal tax took effect on April 1, 1981 and is scheduled to expire, if not reauthorized by Congress, on September 30, 1985. 26 *U.S.C.* § 4611 *et seq.*; 26 *U.S.C.* § 4661 *et seq.*; 42 *U.S.*C. § 9631.

Unlike the Spill Act, the Superfund Act did not cover cleanup expenses for oil spills or property damage claims of any sort. *Compare N.J.S.A.* 58:10-23.11b(k) and 42 *U.S.C.* § 9601(14); *N.J.S.A.* 58:10-23.11(g) and (o) with 42 *U.S.C.* § 9611. Nor did the federal Act provide funding

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[2] 26 *U.S.C.* § 4661 imposes a tax on 42 chemicals at specified rates. *Compare* the New Jersey tax on "hazardous substances" which reaches substances designated as "hazardous" by the Department of Environmental Protection and includes over 300 substances. *N.J.S.A.* 58:10-23.11b(k); *N.J.S.A.* 58:10-23.11h; *see also* the Environmental Emergency Response Act: Hearings on S.1480, before the Senate Committee on Finance, 96th Cong. 2d Sess., Comm. Print at 587 (1980) (testimony of Jerry F. English, Commissioner of the New Jersey Department of Environmental Protection).

for State personnel, equipment, or administrative costs.[3] Rather, the federal fund was designed to provide financing for: 1) emergency removal actions limited to $1 million or six months unless specific findings justifying continued action are made (42 *U.S.C.* § 9604(c)(1)); 2) up to 90% of the cost of remedial actions at priority sites contaminated by hazardous substances (42 *U.S.C.* § 9604(c); *see also* 42 *U.S.C.* § 9605(8)); and 3) claims by the state or federal governments for damage to natural resources (42 *U.S.C.* § 9607(f)). *See generally* 42 *U.S.C.* § 9611.[4] The federal Act specifically obligated states to pay at least 10% of all remedial actions, with the state share expanding to 50% or more for sites owned at the time of disposal by a state or one of its political subdivisions. 42 *U.S.C.* § 9604(c)(3). Moreover, the Act directed the States to assure all future maintenance of the removal and remedial actions financed by Superfund, including some—and perhaps all—of the costs for this work. *Ibid.*[5] In light of CERCLA's limitations, former Representative Eckhardt has observed that the use of the term "comprehensive" in the Act's title is a misnomer. Eckhardt, "The Unfinished Business

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[3] In fact, a proposal by Representative Stockman to create a grant program to support state hazardous waste site investigation and mitigation efforts was rejected. See 2 Library of Congress, Sen. Comm. on Environment and Public Works, 97th Cong., 2d Sess., "A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), P.L. 96-510" (hereinafter "Legis. Hist.") at 295-336.

[4] The Superfund may also be used for certain other matters, such as the compensation of claims asserted prior to CERCLA's adoption under the Clean Water Act, 33 *U.S.C.* § 1321, and the financing of epidemiologic studies. 42 *U.S.C.* § 9611.

[5] Although the State of New Jersey has argued to the United States Environmental Protection Agency ("EPA") that CERCLA requires states to contribute only 10% of operation and maintenance costs, this argument has been rejected by EPA which expects the States to finance the bulk of these costs.

of Hazardous Waste Control", 33 Baylor Law Rev. 253 (1981). The same could be said for the Act's sobriquet: "Superfund."

Perhaps the clearest example of the non-comprehensive nature of CERCLA can be found in 42 *U.S.C.* § 9605. There Congress directed the President (who in turn delegated this responsibility to EPA in Executive Order No. 12316, August 14, 1981, 46 *Fed. Reg.* 42237) to revise the National Contingency Plan ("NCP") for the removal of oil and hazardous substances to reflect and effectuate the new powers and responsibilities created by CERCLA. The NCP was to contain "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." 42 *U.S.C.* § 9605(8)(A).[6] *See also* 42 *U.S.C.* § 9605(8)(B) which mandated the compilation of a National Priority List ("NPL") containing at least 400 of the country's worst hazardous waste sites. This focus on priority releases grew directly out of the congressional recognition that the amount of money made available to Superfund would, in the words of Representative Volkmer, "cover only the tip of the iceberg as far as complete cleanup of all waste sites is concerned." 2 Legis. Hist. 265. *See also* S. Rep. No. 848, 96th Cong., 2d Sess. (1980) at 17, reprinted in 1 Legis. Hist. 324, where it was noted in reference to the then proposed six-year, $4.1 billion Superfund that such an allotment ". . . will permit government response only to the most significant releases. At this

[6] "Removal" actions are immediate, emergency cleanup actions taken on a short-term basis to prevent or mitigate damage to the public and the environment, while "remedial" actions are long-term actions "consistent with permanent remedy." 42 *U.S.C.* § 9601(23) and (24).

level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment."

EPA has further clarified the priority system and the limited availability of Superfund money in the NCP. 40 *C.F.R.* Part 300 (1984). Removal actions will be funded only where the release or threat of a release is sufficiently acute to demand immediate response. Examples of such acute situations provided by EPA are those instances where the release or threatened release will expose the food chain to acutely toxic substances, contaminate drinking water supplies, or result in a fire or explosion. 40 *C.F.R.* § 300.65(a). *See also* 40 *C.F.R.* § 300.67 and 47 *Fed. Reg.* 31199 (1982). As to remedial actions, funding is limited to releases on the N.P.L. 40 *C.F.R.* § 300.68(a). The listing of a site does not guarantee financing, however, because "eligibility of particular actions will be decided on a case-by-case basis" since "current demands for response and expected future demands exceed available funds." 47 *Fed. Reg.* 31196 (1982). Moreover, in regard to claims for damage to natural resources, Congress itself limited the amount of money available to pay such claims to no more than 15% of the Superfund (42 *U.S.C.* § 9611(e)(2)) —an amount EPA has indicated it will not allocate for such purposes. 50 *Fed. Reg.* 9595 (1985). Indeed, the Agency did not even prepare proposed rules governing the natural resource claims process despite congressional direction to do so until New Jersey obtained an injunction mandating this relief. *New Jersey v. Ruckelshaus,* Civil Action No. 84-1668 (D.N.J. December 12, 1984); *see* 50 *Fed. Reg.* 9593 (1985). Both the structure of CERCLA and EPA's administration and implementation of the Act thus highlight the restricted nature of its coverage.

Many of the limitations contained in CERCLA were the product of a last-minute compromise forged by a group of senators during the lame duck session of the 96th Congress which convened in late November 1980. 1 Legis. Hist. VII; 1 Legis. Hist. 681 (remarks of Senator Randolph during floor debate on the compromise measure). The compromise grew primarily out of four different bills which had been considered by both houses of Congress throughout the preceding two years. On the House side, the two major proposals were H.R. 85 and H.R. 7020. As passed by the House, H.R. 85 operated prospectively to address spills of oil and hazardous substances into navigable waters, and created a fund supported by fees and general revenues to finance all government response costs and certain specific damage claims resulting from the destruction of property and natural resources. 2 Legis. Hist. 1016-1114. H.R. 7020 was limited to abandoned hazardous waste sites and proposed addressing the sites on a priority basis in cooperation with the states. 2 Legis. Hist. 391-463. The major Senate proposal was S.1480 which excluded coverage for oil spills, but otherwise addressed all kinds of releases of other hazardous substances, including spills and abandoned hazardous waste sites. 1 Legis. Hist. 462-552. S.1480 also provided compensation for certain specific property damage, natural resource damage, and medical claims incurred by victims of hazardous substance releases. The bill proposed by the Carter Administration, introduced in the Senate as S.1341, addressed spills into navigable waters of petroleum and other hazardous substances as well as abandoned hazardous waste sites. 3 Legis. Hist. 27-60.

It was in the context of the spill-oriented legislative proposals that the suggestion of preempting state taxes

levied to support state response and damage funds first arose. The genesis of the preemption provision is significant because the spill bills anticipated that the funding provided would cover all necessary costs involved in responding to future spills and in compensating the limited kinds of property damage and natural resource claims proposed for coverage. Under the major spill proposal, H.R. 85, states were preempted from levying taxes to pay for "losses" (including response costs) covered by the bill, although states were permitted to impose special taxes to finance the purchase and prepositioning of pollution clean-up and removal equipment as well as claims and damages not covered in the bill. § 110(a) and (b) of H.R. 85, reprinted at 2 Legis. Hist. 1051; § 302(a) of H.R. 85, reprinted at 2 Legis. Hist. 1074-1075; *see also* 2 Legis. Hist. 903-907 (remarks of Representatives Biaggi, Florio and Snyder). Insofar as S.1341 dealt with spills, that proposal also provided for the preemption of state taxes to finance a fund to pay compensation for losses and costs covered by the spill provisions of the bill. § 612(a) of S.1341, reprinted at 3 Legis. Hist. 57.

Preemption of state taxation to finance state spill funds covering response costs and certain damage claims was thought to be appropriate in the spill context because the federal spill program was designed to cover future spills "on an as-needed and comprehensive basis." Statement of Thomas C. Jorling, Assistant Administrator for Water and Waste Management of EPA, before the Senate Committee on Environment and Public Works, June 20, 1979, reprinted at 1 Legis. Hist. 124. Since all spills requiring response would receive it under the legislative proposals, no state funding was needed in that area. *Ibid.* Nor would state financing be necessary for the property

and natural resource claims comprehensively covered by the spill bills.

Although the proposed spill legislation affected state taxation, the preemption was admittedly narrow in scope and prevented states from imposing special taxes only to the extent that those taxes would be dedicated to duplicating elements already provided for in the federal legislation. As Representative Biaggi, the sponsor and floor manager of H.R. 85 stated, ". . . it is not the intent of H.R. 85 to preempt the States from financing by whatever means they choose those activities which are not compensable under H.R. 85." 2 Legis. Hist. 907. And, as Representative Livingston added, "This bill does not totally preempt the field; it only preempts State and local enactments which would duplicate the purpose of the funds established in H.R. 85." 2 Legis. Hist. 920. Under the proposed spill legislation, therefore, states could impose taxes to finance special funds for spill-related costs and claims not covered by the federal program.

Where abandoned sites were concerned, however, none of the major legislative proposals that pre-dated the compromise measure that became CERCLA contained tax exemption provisions. *See* H.R. 7020 as passed (2 Legis. Hist. 391-463); S.1480 as passed (1 Legis. Hist. 462-552); and S.1341 as introduced at § 612(b) (3 Legis. Hist. 57). The rationale for not preempting state taxation in this area was that the abandoned site proposals—S.1480 and part of S.1341 in particular—required state cost-sharing and provided a level of funding that, "fell far short of what would be needed to cleanup all the sites that will need some kind of remedial action in the next few years." Statement of Swep T. Davis, Associate Assistant Administrator for Water and Waste Management of EPA, recorded in

Hearings on S.1480 before the Senate Committee on Commerce, Science and Transportation, 96th Cong., 2nd Sess. (September 11-12, 1980), Comm. Print at 175. Since a comprehensive program covering all response costs was not achievable given budget constraints in the abandoned site area, preemption of state taxation was at first thought to be completely inappropriate. *Ibid. See also* Jorling Statement, 1 Legis. Hist. 124.

In the course of preparing the compromise measure, however, a provision affecting state taxation was inserted in CERCLA even though the legislation addressed abandoned sites as well as non-petroleum hazardous spills. Modeled after the preemption provisions contained in the spill proposals, the language utilized in the compromise similarly limited the preemption of state taxation to only those areas covered by the federal program:

> Except as provided in this chapter, no person may be required to contribute to any fund, *the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter.* Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase of prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State. [42 *U.S.C.* § 9614(c); emphasis added].

Given the restricted nature of CERCLA coverage—particularly as restricted in terms of response costs where coverage was not intended to be comprehensive, but to address only the worst releases of hazardous substances nationwide—the language of 42 *U.S.C.* § 9614(c) had even a narrower impact in the context of CERCLA than similar

language had had in the more comprehensive oil spill legislation. The language of 42 *U.S.C.* § 9614(c) thus allows New Jersey to continue collecting the Spill Fund tax to finance items not covered by Superfund such as oil spill response costs, property damage and loss of earnings or tax revenue claims, State administrative costs, State cost-sharing and maintenance costs under CERCLA, and remedial actions at New Jersey sites not included on the NPL. Moreover, the "may be compensated" language used in 42 *U.S.C.* § 9614(c) would also allow the State to use Spill Fund moneys to pay costs where Superfund financing proves inadequate or is not made available—*i.e.*, where State requests for removal actions are denied or limited by cost or duration under 42 *U.S.C.* § 9604(c)(1), or where federal funding for remedial actions is either not provided to a site on the NPL or is cut off prior to completion of necessary cleanup work.

The legislative history discussing the compromise language supports this interpretation. Obviously concerned about the impact of the provision on the State's Spill Fund, Senator Bill Bradley of New Jersey questioned Senator Jennings Randolph of West Virginia, a sponsor of the Superfund effort and Chairman of the Committee on Environment and Public Works which had primary responsibility for the measure in the Senate, as to the future of state taxes on industry to finance State response funds if the foregoing provision were adopted. Included in the colloquy between the two senators were the following remarks:

> MR. RANDOLPH. * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.
>
> * * *

> MR. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?
>
> MR. RANDOLPH. That is correct.
>
> MR. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?
>
> MR. RANDOLPH. That is correct.
>
> MR. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?
>
> MR. RANDOLPH. This legislation would permit that to happen. [126 Cong. Rec. 30949 (1980), reprinted at 1 Legis. Hist. 732-733].

Given the narrow scope of the language used in 42 *U.S.C.* § 9614(c) and the guidance of the foregoing colloquy, once the Superfund Act was adopted New Jersey began to administer the Spill Act to supplement rather than to duplicate federal cleanup efforts. The State had the flexibility to adapt its program in this way because the New Jersey Legislature had vested broad discretion in the Department of Environmental Protection to select the type and extent of cleanup and related activities to be financed by the Spill Act tax. *N.J.S.A.* 58:10-23.11f. In the post-Superfund era, therefore, New Jersey has sought to maximize the infusion of federal dollars into the State for cleanup activities, and has devoted its Spill Fund to items not covered by the federal Act or to items where federal financing is unavailable.[7]

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[7] Appellants' suggestion to the contrary (Exxon brief at 25, fn.26), is both incorrect and unsupported by the record in this

(Continued on following page)

Following the adoption of the Superfund Act, however, New Jersey's right to continue the collection of the Spill Fund tax was challenged by the Exxon Corporation and four other owners of "major facilities" responsible for paying the tax (referred to collectively as "Exxon") on the sole ground that *N.J.S.A.* 58:10-23.11h was preempted by the language contained in § 114(c) of the Superfund Act, codified at 42 *U.S.C.* § 9614(c). Following an unsuccessful attempt to raise this challenge in federal court (*see Exxon Corp. v. Hunt,* 683 *F.*2d 69 (3rd Cir. 1982), *cert. denied,* 459 *U.S.* 1104 (1983)), Exxon pursued the matter through the New Jersey court system. Upon reviewing cross-motions for summary judgment on a limited record, the Tax Court of New Jersey upheld the validity of the Spill Fund tax. *Exxon Corp. v. Hunt,* 4 *N.J.* Tax 294 (1982) (reprinted in the appendix attached to Appel-

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case. Moreover, Exxon's reliance on reports prepared by the New Jersey State Auditor for fiscal years 1981 and 1982 and lodged by appellants with the Court is misplaced; those reports simply do not demonstrate, as Exxon asserts, that New Jersey has improperly used Spill Fund moneys subsequent to the adoption of 42 *U.S.C.* § 9614(c). First, the reports include fiscal year 1981 which extended from July 1, 1980 to June 30, 1981. The Superfund Act was not even in existence for almost half of this period, and the federal tax designed to support the program was not imposed until April 1981. The Superfund program was thus a nullity for most—if not all—of this period. Furthermore, the Auditor's reports do not indicate when the tax moneys expended for cleanup purposes were collected. If collected prior to the effective date of CERCLA, there would be no preemption whatsoever in regard to their use. In addition, Exxon failed to mention that the NPL was not promulgated until September 8, 1983 (48 *Fed. Reg.* 40658)—well after the alleged misspending of funds occurred. These and other items not addressed by Exxon or by the Auditor's reports (such as the accounting procedures used by the Spill Fund and the source of the federal funds obtained for cleanup purposes) demonstrate that Exxon's assertions about Spill Fund expenditures are unsupported and must be rejected as lacking in foundation.

lant Exxon's Jurisdictional Statement ("JSa") at JSa47 to JSa78). This determination was subsequently affirmed by both the Appellate Division of the Superior Court, *Exxon Corp. v. Hunt,* 190 *N.J. Super.* 131, 462 *A.*2d 1983 (App. Div. 1983) (reprinted at JSa37 to JSa46) and by the Supreme Court of New Jersey, *Exxon Corp. v. Hunt,* 97 *N.J.* 526, 481 *A.*2d 271 (1984) (reprinted as JSa15 to JSa36).

In upholding the Spill Fund tax against Exxon's challenge, the Supreme Court of New Jersey focused on the "may be compensated" language of § 114(c) and the Superfund statutory scheme which addressed priority sites to the exclusion of other problem areas. *See* 42 *U.S.C.* § 9605; 40 *C.F.R.* § 300.68. In light of the limited coverage of CERCLA, the Supreme Court of New Jersey echoed the conclusion of the Tax Court which had found that "[i]t simply strains credulity to say that hazardous waste sites and spills not meeting the [priority list] criteria are claims which 'may be compensated' under [Superfund]." 97 *N.J.* at 543 (JSa34). Based on this realistic analysis of Superfund coverage, the court below rejected Exxon's broad preemption claim and endorsed "The more logical conclusion . . . that Congress contemplated that the federal government would attempt to deal with the problems of the most seriously affected sites . . . and to allow states to maintain a compensation fund . . . to conduct their own cleanup efforts on those sites not receiving Superfund compensation and to provide for their cooperative program components including their 10% share of cleanup costs, related administrative costs for equipment and personnel, and other program features not covered by Superfund. . . ." 97 *N.J.* 543-544 (JSa35).

Dissatisfied with this result, Exxon filed a Notice of Appeal from the judgment of the Supreme Court of New

Jersey on November 19, 1984. After requesting and receiving the views of the Solicitor General as to the issues involved in this appeal, the Court noted probable jurisdiction on June 17, 1985. This brief is submitted on behalf of appellees who urge affirmance of the judgment below.

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SUMMARY OF ARGUMENT

In construing explicit preemption provisions, the Court must give effect to the will of Congress and not enlarge the preemptive scope of a federal statute beyond that intended by Congress. *Metropolitan Life Ins. Co. v. Massachusetts,* 105 *S.Ct.* 2380, 2390 (1985). Even in explicit preemption cases, therefore, there is a presumption against the complete displacement of state regulation, particularly where Congress has used statutory language effecting only limited preemption and leaving room for state action. *Ibid.*

In adopting the Superfund Act, Congress placed an extremely narrow limitation on the power of the states to impose special taxes. 42 *U.S.C.* § 9614(c). States were prohibited only from levying taxes for the purpose of compensating "claims for any costs of response or damages or claims which may be compensated under this subchapter." *Ibid.* This provision limits the preemption of state taxation to the areas covered by Congress on the federal level. Correspondingly, all areas not covered by Superfund may properly be financed by state funds supported by special taxes.

A careful analysis of CERCLA reveals that the availability of Superfund financing is restricted to priority sites or releases of national significance. 42 *U.S.C.* § 9605 (8); 40 *C.F.R.* § 300.68(a). Moreover, no federal compensation whatsoever is provided for petroleum spills or nongovernmental third party damage claims. 42 *U.S.C.* § 9601(14); 42 *U.S.C.* § 9611. This narrow federal coverage thus leaves many areas open for financing on the state level through special taxes.

The tax levied under the New Jersey Spill Act may consequently be used to fund all authorized state costs excluded from federal coverage. *Compare N.J.S.A.* 58:10-23.11(g) and (o) with 42 *U.S.C.* § 9611. Authorized state costs ineligible for federal financing include expenditures incurred in responding to petroleum spills, the administrative expenses incurred in implementing the Spill Act by the Spill Fund and the Department of Environmental Protection, and equipment and personnel costs. In addition, the Spill Fund may be used for the payment of damage claims, including claims for damage to property, loss of earnings, and loss of tax revenues. *Compare N.J.S.A.* 58:10-23.11(g) and (o) with 42 *U.S.C.* § 9611. Moreover, the State tax may also be used to finance the 10% or greater state share required for federal action under CERCLA, 42 *U.S.C.* § 9604(c), because such an expense is statutorily ineligible for federal compensation. Likewise, special state taxes may be used to provide maintenance costs incurred by the states at Superfund sites. *See* 42 *U.S.C.* § 9604(c)(3). These areas alone support the validity of the Spill Fund tax.

State taxes may also be used to supplement federal response efforts, however, because the "may be compensated" formulation limits federal preemption to instances where there is some likelihood or probability of Superfund financing. Where federal regulations establish criteria that must be met to qualify for Superfund compensation, sites failing to meet these standards are not eli-

gible for federal funding and thus fall outside of the preemptive scope of 42 *U.S.C.* § 9614(c). Moreover, where EPA rejects State requests for Superfund financing, such rejections are tantamount to declarations of ineligibility. Special state taxes may thus be used to support all such work not actually compensated by Superfund. State taxation is limited, therefore, only for the purpose of financing costs that are realistically eligible for federal funding.

This construction is amply supported by the legislative history. All of the precursors to 42 *U.S.C.* § 9614(c) similarly limited the preemption of state taxation only to those areas covered on the federal level. *See, e.g.,* § 110(a) of H.R. 85, reprinted at 2 Legis. Hist. 1051; remarks of Representatives Biaggi, Florio, and Snyder, reprinted at 2 Legis. Hist. 903-907. States were thus free to use special state taxes to supplement—albeit not to duplicate—federal coverage. This narrow scope of preemption was carried over into 42 *U.S.C.* § 9614(c), as demonstrated conclusively by the remarks of Senators Randolph and Bradley. According to the colloquy between these two senators, states may levy special taxes "to cover expenses and economic loss not covered under the provisions of this bill . . ." 1 Legis. Hist. 732. This interpretation has recently been confirmed in both the Senate and the House where committees dealing with proposed Superfund reauthorization legislation have attempted to dispel "any cloud of uncertainty over the legitimacy" of continued state taxation under 42 *U.S.C.* § 9614(c). *See* Superfund Amendments of 1984, Sen. Rep. No. 98-631, 98th Cong., 2nd Sess. (September 21, 1984), Comm. Print at 35-36; Superfund Expansion and Protection Act of 1984, H. Rep. No. 98-890, Part 1, 98th Cong., 2nd Sess. (July 15, 1984), Comm. Print at 58-59. Both of these reports reaffirm the

construction of 42 *U.S.C.* § 9614(c) provided in the Bradley/Randolph colloquy.

The intent of Congress was thus fulfilled by the Supreme Court of New Jersey when it upheld the Spill Fund tax. As a result, this Court should affirm the judgment below.

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ARGUMENT

POINT I

THE LANGUAGE OF 42 U.S.C. §9614(c) AND THE STRUCTURE OF THE SUPERFUND ACT CONTEMPLATE CONTINUED STATE TAXATION TO FINANCE STATE HAZARDOUS WASTE PROGRAM COSTS EITHER NOT COVERED OR NOT ACTUALLY COMPENSATED BY SUPERFUND.

The primary thrust of preemption analysis is to determine the intent of Congress in enacting the federal statute in issue. *Shaw v. Delta Air Lines, Inc.,* 463 *U.S.* 85, 95 (1983); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta,* 458 *U.S.* 141, 152 (1982). For until that intent is ascertained, it is impossible to decide whether the state enactment "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and thus must be invalidated under the Supremacy Clause. *Jones v. Rath Packing Co.,* 430 *U.S.* 519, 526 (1977), quoting *Hines v. Davidowitz,* 312 *U.S.* 52, 67 (1941).

In reviewing a preemption challenge, however, state legislation is presumed valid and preemption is disfavored, to be found only in the clearest cases of conflict. *Maryland v. Louisiana,* 451 *U.S.* 725, 746-747 (1981). This rule applies even in "explicit" preemption cases such as the

instant matter where the scope of preemption contained in a particular congressional enactment is in question. The Court recently affirmed this principle in *Metropolitan Life Ins. Co. v. Massachusetts,* 105 S.Ct. 2380, 2390 (1985), when it upheld a Massachusetts statute because the state legislation fell outside of the explicit preemption language contained in the federal Employee Retirement Income Security Act of 1974 ("ERISA"). Even in cases involving express preemption clauses, therefore, "[t]he presumption is against pre-emption," and the Court is "not inclined to read limitations into federal statutes in order to enlarge their preemptive scope." *Ibid.*

Preemption analysis generally follows a two-tiered format. First, a court will ascertain the scope and meaning of the two statutes in question; secondly, a court will determine whether the State enactment necessarily conflicts with its federal counterpart, or can coexist with it without impeding the federal objective. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 *U.S.* 311, 317 (1981). Such an inquiry is not restricted to analyzing the statutory language alone, but requires a court "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co., supra,* 430 *U.S.* at 526. In comparing the operation and effect of state and federal enactments, particularly where federal preemption is explicitly narrow and partial in scope, it is important to keep in mind that, "Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field . . . is not forbidden or displaced." *Kelly v. State of Washington,* 302 *U.S.* 1, 10 (1937). *See also Askew v. American Waterways Operators, Inc.,* 411 *U.S.* 325, 332 (1973).

Nothing in *Aloha Airlines, Inc. v. Director of Taxation,* 464 *U.S.* 7 (1983), requires deviation in this case from either the presumption against preemption or the two-tiered method of analysis previously followed by this Court and used below by the Supreme Court of New Jersey. For in *Aloha Airlines* the Court indicated that where an express preemption provision clearly and unambiguously forbids precisely the kind of state action under attack, the state statute can be invalidated without further recourse to legislative history or rules developed in cases where the scope of federal preemption is much less clear. *Ibid.* at 12. Since the explicit preemption language in issue here differs from that involved in *Aloha Airlines* in that 42 *U.S.C.* §9614(c) does not categorically prevent all state taxation of a particular category, but rather is much more circumscribed in nature, the truncated review that proved sufficient in *Aloha Airlines* is inappropriate in this context.[8]

As in all cases involving explicit preemption clauses where the task before the Court is one of statutory con-

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[8] *Compare* 49 *U.S.C.* § 1513(a) which provides that, "No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . ." with the language of 42 *U.S.C.* § 9614(c) which provides that, "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims *which may be compensated under this subchapter.*" (Emphasis added). The italicized language of 42 *U.S.C.* § 9614(c) limits the preemptive scope of the provision and compels resort to the rest of the Superfund Act to determine the extent of federal coverage and—derivatively—the extent of federal preemption. In such circumstances where Congress has consciously chosen narrowing language to limit the scope of preemption, and a traditional function of state government (*i.e., taxation*) is at stake, the presumption against preemption is particularly strong. *See Metropolitan Life Ins. Co. v. Massachusetts, supra,* 105 *S.Ct.* at 2389-2390.

struction, the starting point for analysis is the language of the federal statute. *See Metropolitan Life Ins. Co. v. Massachusetts, supra,* 105 *S.Ct.* at 2386-2389; *Shaw v. Delta Air Lines, Inc., supra,* 463 *U.S.* at 95. At issue here is the following language contained in 42 *U.S.C.* § 9614(c):

> **Except as provided in this Act, no person may be required to contribute to any Fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter.**

This provision, by its own terms, restricts state taxation if the purpose of the tax is to finance a fund used to pay claims "which may be compensated under this subchapter." Although not a paragon of legislative drafting, this language limits the preemption of state taxation to the areas Congress decided to cover on the federal level. A corollary of this limitation is that Congress thus left to the states the power to tax industry for claims excluded from coverage by Superfund. For, when Congress circumscribes its coverage in this manner, "state regulation outside that limited field . . . is not forbidden or displaced." *Kelly v. State of Washington, supra,* 302 *U.S.* at 10; *see also Shaw v. Delta Air Lines, Inc., supra,* 463 *U.S.* at 97fn. 17. (state anti-discrimination employment law preempted only insofar as it related to pension plans covered by ERISA and thus continued to apply to other aspects of the employment relationship such as hiring, promotions and salaries).

As noted above, Superfund provides limited financing for certain removal actions involving acute toxicity (42 *U.S.C.* § 9604(c)(1); 40 *C.F.R.* 300.65), for remedial actions at sites on the NPL (40 C.F.R § 300.68(a)), and for claims brought by the state or federal governments for damage to natural resources (42 *U.S.C.* § 9607(f)). 42 *U.S.C.* § 9611. No federal financing in any of these areas is provided for petroleum releases, however. 42 *U.S.C.* § 9601(14). CERCLA thus leaves completely untouched many categories of expenditures covered by Spill Fund. These categories include the cost of remedying petroleum spills; the payment of damage claims, including claims for damage to property, loss of earnings, and loss of tax revenues; and nongovernmental claims for damage to natural resources. *Compare* 42 *U.S.C.* § 9611 with *N.J.S.A.* 58:10-23.11g(a). Moreover, the Spill Fund also finances other costs excluded from federal coverage such as personnel and equipment costs incurred by the Department of Environmental Protection in operating the State response program, and the administrative costs of the Spill Fund. Although Exxon has referred to these purposes of the Spill Fund as "incidental" (Exxon brief at 22-23, fn. 24), New Jersey rejects this characterization as inconsistent with the State statutory scheme. Petroleum spills in particular are an integral part of the coverage provided by Spill Fund,[9] as are administrative expenses which support the operation of both the Spill Fund and the Department of Environmental Protection's hazardous site cleanup program.

CERCLA also specifically requires states to provide at least 10% of the cost of remedial actions. 42 *U.S.C.* § 9604(c). Since these costs are not eligible for Super-

[9] The Spill Act placed special emphasis on providing a fund to address petroleum spills because of the fear that such a spill would seriously damage the waters and beaches of the New Jersey shore, thus interfering with the State's lucrative tourist industry. *N.J.S.A.* 58:10-23.11a. That New Jersey has not suffered a catastrophic oil spill since the Spill Act was adopted neither renders this purpose of the Act "incidental," nor removes the need to collect taxes to provide a contingency fund for use in the event of a serious petroleum spill. The tax court noted this important fact in its opinion upholding the Spill Fund tax (JSa75).

fund financing, a state may levy its own tax to fund these expenditures.[10] Furthermore, since the Spill Act in *N.J.S.A.* 58:10-23.11f vests the Department of Environmental Protection with discretion in financing cleanup actions, this flexible grant of authority allows the Department to use Spill Fund moneys to provide New Jersey's cost share under CERCLA. Any doubt that may have existed concerning this use of the Spill Fund was removed by the New Jersey Legislature when it adopted the Hazardous Discharge Bond Act, *P.L.*, 1981, *c.* 275. This Act provided for the sale of bonds to finance a fund supplementary to Spill Fund, and authorized the use of money obtained under the Act to pay the non-federal share of any federal cleanup program "if moneys available pursuant to *P.L.* 1976, *c.* 141 [Spill Act] are currently insufficient to cover the share." *Ibid.* at § 15. Since New Jersey currently has 85 sites on the NPL and 12 more have been proposed for addition to the list, the State share of the cost of remedial actions has been a significant expense of the Spill Fund, and is expected to constitute a significant expenditure in the future if Superfund is reauthorized. Moreover, as remedial and removal actions are concluded at New Jersey sites, it is anticipated that the costs of maintaining these sites will become a significant non-federal cost of the State's hazardous waste cleanup program.

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[10] Interestingly, Dr. Louis Fernandez, Vice Chairman of Monsanto Company, a party to this litigation, submitted a statement on behalf of the Chemical Manufacturers Association to the Senate Committee on Finance during the Committee's hearings on S.1480—a statement that supported preemption "except to the extent used to raise money for matching purposes under this legislation." Hearings on S.1480 before the Committee on Finance, United States Senate, 96th Cong., 2d Sess; September 11-12, 1980, Comm. Print at 209. Appellants' position in this case, however, does not recognize the state share of the cost of remedial actions as a legitimate object of state taxation.

The plain language of 42 *U.S.C.* § 9614(c) thus permits states to impose taxes to finance all of the elements of state hazardous waste programs not covered by Superfund. Under the New Jersey Spill Act, therefore, the State may continue to levy its tax on petroleum and hazardous substances to finance a whole host of items, including State response to petroleum spills; administrative, personnel, and equipment costs incurred by the Spill Fund and the Department of Environmental Protection; property damage claims; the New Jersey share of the cost of Superfund remedial actions; and State maintenance costs at Superfund sites.

While the areas of Spill Fund spending that fall beyond the scope of federal coverage would alone sustain the validity of the New Jersey tax, the language used by Congress in 42 *U.S.C.* § 9614(c)—when analyzed against limitations in Superfund coverage imposed by EPA—allows the states to supplement federal cleanup efforts by financing costs not actually compensated by Superfund. This is so because the "may be compensated" formulation limits federal preemption to instances where there is some likelihood or probability of Superfund financing. *See Webster's Third New International Dictionary* (1976) at 1396, which defines "may" as "in some degree likely to"; *see also Black's Law Dictionary* (5th ed. 1979) at 883, which defines "may" as "an auxiliary verb qualifying the meaning of another verb by expressing . . . possibility [or] probability . . ." Where federal regulations establish criteria that must be met to qualify for Superfund financing, therefore, sites that fail to meet these standards are not eligible for federal funding and thus fall outside of the preemptive scope of 42 *U.S.C.* § 9614(c).

Perhaps the clearest example of this point involves federal funding for remedial actions where the NCP pro-

vides that Superfund financing will be made available only to sites on the NPL. 40 *C.F.R.* § 300.68(a). Remedial actions at New Jersey sites not included on the NPL could thus be financed by the Spill Fund since there is no reasonable likelihood under the federal program that such sites would receive Superfund financing. State funding of remedial actions at non-NPL sites would be used to clean up problem areas of local—but not national—significance. A similar analysis applies to removal actions that fail to qualify under the "acute toxicity" test established by EPA in the NCP as a prerequisite to federal funding. 40 *C.F.R.* § 300.65. As noted above, EPA's implementation of the Superfund program is relevant to the issue of preemption because courts must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co., supra,* 430 *U.S.* at 526.

In addition, where EPA rejects state requests for Superfund financing for emergency removal actions, for remedial actions at NPL sites,[11] or for damage to natural resources, such rejections effectively foreclose the possibility of federal financing for the requested action. Since a rejection is tantamount to a declaration of ineligibility for federal financing, State funds should be permitted to finance all work for which a rejection is received. *See* the introduction to the NCP, 47 *Fed. Reg.* 31195 to 31196,

[11] EPA has indicated that inclusion on the NPL is merely the first step in qualifying for Superfund-financed remedial action; it is not a guarantee that compensation will be provided. For, as EPA has stated, "If a release is included on the NPL but a later remedial investigation discloses the hazard to be less significant than originally thought to be, a decision may be made not to provide Fund financed remedial response." 47 *Fed. Reg.* 31187 (1982). *See also* 48 *Fed. Reg.* 40659 (1983) ("Inclusion of a site on the NPL does not establish that EPA necessarily will undertake response actions.").

where EPA noted that "eligibility" for Superfund financing will be decided on a case-by-case basis since insufficient funding was available to support all sites in need of cleanup.

The use by Congress of the "may be compensated" language is particularly telling in this regard. Congress selected this formulation over "may be asserted" which would have prevented the use of state taxes to finance any claim which could conceivably have been brought under Superfund, regardless of its chances for eventual financing.[12] By utilizing "may be compensated" instead, however, Congress limited preemption to those areas where there was a realistic chance of federal financing. Once that opportunity is foreclosed and ineligibility established for any specific action, though, the "may be compensated" formulation allows state funds to pick up the slack. It was precisely this situation that the Supreme Court of New Jersey addressed when it found that the Spill Fund could be used to finance hazardous waste cleanup costs and related claims "not actually paid under Superfund." (JSa36).

This "actual compensation" test, however, presupposes that states will request Superfund financing whenever a site or release falls reasonably within the criteria used to establish NPL ranking for remedial actions, or within the acute toxicity criteria used to determine federal funding for removal actions. To the extent that New Jersey sites remain realistically eligible for federal financing, therefore, Spill Fund revenues could not be used to support independent, state-sponsored cleanup efforts at

[12] The "may be asserted" formulation was proposed by Senator Cannon in Amend. No. 2387 to S.1480, reprinted at 3 Legis. Hist. 185-186. *See also* § 110 of H.R. 85, reprinted at 2 Legis. Hist. 1051.

those sites. This, then, is the real thrust of 42 *U.S.C.* § 9614(c)—to channel the states into the Superfund program for acutely hazardous and national priority sites. Congress thus used 42 *U.S.C.* § 9614(c) to promote national uniformity in responding to priority sites—at least to the extent that federal financing would be made available to support such a program. States that want to maintain their own funds supported by special taxes must thus maximize their participation in the Superfund program and cannot use their funds to circumvent federal regulatory requirements or other entanglements regarding sites realistically eligible for federal financing.[13] Should a state want to embark upon such an independent program, however, it would be required to finance it through general revenues, as allowed by the second sentence of 42 *U.S.C.* § 9614(c) ("Nothing in this section shall preclude any State from using general revenues for such a fund. . . .").

The actual compensation test thus encompasses the concept of compensability because it restricts the use of state taxes to finance costs realistically eligible for Superfund financing unless and until a determination of ineligibility is made. Although the "may" in "may be compensated" could conceivably be interpreted as "shall" (*see Webster's Third New International Dictionary* (1976) at 1396 which notes that "may" often means "shall" when used in statutes; *see also Black's Law Dictionary* (5th ed.

[13] Just such a situation occurred in New Jersey when the State wanted to deviate from EPA's policy of allowing potentially responsible parties to conduct the remedial investigation/feasibility study ("RI/FS"; *see* 40 *C.F.R.* § 300.68(d)) at an NPL site. In order to ensure governmental as opposed to private party control of the RI/FS process, New Jersey withdrew its request for Superfund financing. Because it appeared that the cost of the study realistically could have been financed under the federal program, the Attorney General's Office advised the Spill Fund not to pay for the RI/FS. General revenues were used instead.

1979) at 883 which notes that "may" and "shall" are frequently used interchangeably, and advises that the meaning of "may" should be sought in its context rather than through resort to grammar), it need not be given anything other than its common meaning of "likely to" to support the validity of the Spill Fund tax and the judgment to this effect rendered below.

Although Exxon argues that the "actual compensation" test makes 42 *U.S.C.* § 9614(b) and (c) impermissibly redundant, this is not the case.[14] For 42 *U.S.C.* § 9614(b) prevents double recoveries for the same claims no matter what the source of compensation, and does not refer solely to governmental funds. If a person—including a state government—were to obtain complete compensation for response costs from a responsible party through a state court common law nuisance action, for example, this section would prevent a duplicate recovery under Superfund. By prohibiting double recoveries categorically regardless of source, 42 *U.S.C.* § 9614(b) fosters the conservation of limited financial resources available for compensating claims, protects the subrogation rights of the Superfund, and promotes the early election of remedies by claimants. In no way can it be deemed to be redundant of 42 *U.S.C.* § 9614(c) which addresses entirely different concerns related to state taxation, as noted above.

[14] 42 *U.S.C.* § 9614(b) provides in full that:

> Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

In conclusion, the preemptive scope of 42 *U.S.C.* § 9614(c) is limited by its own terms and the structure of the Act and its implementing regulations to those costs covered or actually compensated by the Superfund. Consequently, the decision of the Supreme Court of New Jersey should be affirmed.

POINT II

THE LEGISLATIVE HISTORY OF THE SUPERFUND ACT SUPPORTS NEW JERSEY'S INTERPRETATION OF 42 U.S.C. § 9614(c).

In interpreting statutes, the duty of the Court is to enforce the will of Congress. *Chemical Mfrs. Ass'n v. Natural Res. Defense Council,* 105 *S.Ct.* 1102, 1108 (1985). Although the Court starts the process of statutory construction with the language of the statute, its analysis does not necessarily end there. Rather, the Court also considers the object and policy of the statute as well as its legislative history. *Stafford v. Briggs,* 444 *U.S.* 527, 536-537 (1980). Indeed, all materials relevant to determining legislative intent should be reviewed. *Watt v. Alaska,* 451 *U.S.* 259, 265-266 (1981); *Andrus v. Shell Oil Co.,* 446 *U.S.* 657, 666 fn.8 (1980). For, as Chief Justice Marshall declared in the early days of this Court, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *Ibid.,* citing *United States v. Fisher,* 2 Cranch 358, 386, 2 *L.Ed.* 304 (1805). *See also* Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. Law Rev. 527, 541 (1947). To understand the scope and meaning of 42 *U.S.C.* § 9614 (c), therefore, resort to the legislative history of the provision is necessary. Indeed, the evolution of the provision may be the best available guide to legislative intent. *See generally Chemical Mfrs. Ass'n v. Natural Res. Defense*

Council, supra, 105 *S.Ct.* at 1108; *Russello v. United States,* 464 *U.S.* 16, 23 (1983).

The Superfund Act was adopted in the waning hours of the 96th Congress to provide a "first step to respond to the severe threats posed by spills, leaks and releases of hazardous substances, as well as toxic dumpsites." 1 Legis. Hist. 711 (remarks of Senator Mitchell). The road to passage, however, "was neither easy nor direct." 1 Legis. Hist. V (preface to legislative history of Superfund prepared by the Congressional Research Service). Indeed, the Act was an eleventh hour compromise forged primarily in the Senate on the basis of four predecessor bills: H.R. 85 which addressed spills into navigable waters of oil and hazardous substances; H.R. 7020 which was confined to abandoned hazardous waste sites; S. 1480 which addressed all releases of nonpetroleum hazardous substances (including spills and abandoned sites) and provided for victim compensation; and S. 1341 which was proposed by the Carter Administration and combined coverage in one bill for oil and hazardous substance spills as well as abandoned sites. *See generally,* 1 Legis. Hist. V-VII; 1 Legis. Hist. 681-773 (Senate debate); 1 Legis. Hist. 774-775 (letter transmitting the compromise measure from the Senate to the House).

Despite the rushed and somewhat confusing circumstances surrounding the enactment of CERCLA, the evolution of the provision concerning state taxation can be charted through the 96th Congress. The preemption of state taxation and states response programs became a central issue during consideration by the House of H.R. 85, the oilspill bill that eventually was broadened to include spills of hazardous substances. *Compare* H.R. 85 as introduced on January 15, 1979 (2 Legis. Hist. 474-524) with H.R. 85 as passed by the House on September 19,

1980 (2 Legis. Hist. 1016-1114). In H.R. 85, the House proposed a national, comprehensive scheme of liability and compensation to address pollution caused by spills of oil and hazardous substances into navigable waters. The bill was intended to provide a uniform federal program to replace the existing "patchwork quilt" of federal and state laws in the area. 2 Legis. Hist. 527 (H. Rep. No. 96-172, part 1). The bill imposed strict liability on the persons responsible for spills (§ 104, reprinted at 2 Legis. Hist. 1028-1033),[15] and also required vessels and other entities involved in the transportation and handling of oil and hazardous substances to obtain insurance to cover damages and response costs resulting from spills (§ 105, reprinted at 2 Legis. Hist. 1034-1037). To provide compensation in those situations where a party responsible for a spill was either unknown or incapable of financing the costs of response and damages, however, H.R. 85 proposed the creation of a fund supported in large part by fees on oil and certain chemicals (Title V, reprinted at 2 Legis. Hist. 1093-1104). Although some concern was expressed about the impact of the fees on industry, no adverse effect was anticipated. Indeed, the anticipated impact of the fees was described as "minimal." 2 Legis. Hist. 567 (H. Rep. No. 96-172, part 1).

H.R. 85 made the fund "liable, without any limitation, for all damages which are compensable damages under title V of this Act, to the extent that the loss is not otherwise compensated." § 104(f)(1), reprinted at 2 Legis. Hist. 1031. "Compensable damages," in turn, were defined as "damages asserted for":

[15] Citations are to the oilspill portion of H.R. 85; parallel provisions can be found relating to hazardous substance spills in Title III, reprinted at 2 Legis. Hist. 1061-1090.

(A) removal costs,
(B) injury to, or destruction of, real or personal property,
(C) injury to, or destruction of, natural resources, and
(D) loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources [subject to certain conditions]. [§ 531, reprinted at 2 Legis. Hist. 1104].

This definition excluded damages which had been covered in earlier versions of the bill, including the loss of use of property or natural resources, and the loss of tax revenue for a period of one year due to property damage. *Compare* H.R. 85 as passed with § 103(a) of H.R. 85 as introduced, reprinted at 2 Legis. Hist. 487.

Against the backdrop of the coverage provided in the final version of H.R. 85, the House proposed the following preemption language:

> Sec. 110.(a) Except as provided in this title—
>
> (1) no action may be brought in any court of the United States, or of any State or political subdivision thereof, for damages for an economic loss described in section 103(a), a claim for which may be asserted under this title, and
>
> (2) *no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a compensable damage under title V,* nor to establish or maintain evidence of financial responsibility relating to the satisfaction of a claim for such a loss [reprinted at 2 Legis. Hist. 1051; emphasis added].

H.R. 85 went on to provide, however, that "Nothing in subsection (a) shall preclude any State from imposing a tax or fee upon any person or upon oil in order to finance the purchase and prepositioning of oil pollution cleanup

and removal equipment." § 110(b), reprinted at 2 Legis. Hist. 1051. *See also* § 302(a) of H.R. 85 which imposes substantially similar requirements in regard to hazardous substance spills (2 Legis. Hist. 1074-1075).

The preemption provisions of H.R. 85 sparked a considerable amount of concern and comment in the House. During the course of debate on the measure, Representative Biaggi—the floor manager of the bill—noted the growing concern about the continuing existence of State funds and stated that, "What H.R. 85 does is to prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for an oil spill damage claim as defined in title V of the bill." 2 Legis. Hist. 903. This statement led to a colloquy between Representative Biaggi and Representative Florio from New Jersey who was concerned about the impact of the provision on New Jersey's Spill Fund:

> Mr. Florio . . . Am I correct in understanding that it is the purpose of section 110 to prohibit States from requiring any person to contribute to a fund for the purpose of reimbursing claims as described in title V?
>
> Mr. Biaggi. Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay damage compensable under H.R. 85.
>
> Mr. Florio. However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with spills and discharges of oils and hazardous substances that are not compensable damages as defined in this legislation or that do not occur in or threaten the navigable waters of the United States.
>
> Mr. Biaggi. The gentleman is correct. [2 Legis. Hist. 904].

The colloquy went on to establish that H.R. 85 would not prevent states from levying taxes "to finance a State fund

designed to cover expenses and economic loss not covered under the provisions of H.R. 85," or from using such taxes "to provide intermediate, up front capital to pay for [response] activities and seek reimbursement from the Fund established under H.R. 85." *Ibid.* Moreover, the colloquy stated that there would be no preemption whatsoever in regard to the use of state taxes collected prior to the effective date of H.R. 85. 2 Legis. Hist. 905.

The meaning of the preemption provisions was further clarified in the following colloquy between Representatives Biaggi and Snyder:

> Mr. Snyder. Further with respect to the existing State fund, will it be permissible for the State of New Hampshire to maintain that fund and continue raising revenues for that fund and any purposes other than those covered by H.R. 85? Specifically, I refer to maintenance of a State staff as well as the purpose of prepositioning of equipment and materials for cleanup.
>
> Mr. Biaggi. The preemption provision in H.R. 85 would not prohibit the maintenance and operation of such a fund as the gentleman mentions for the purposes he cites.
>
> Mr. Snyder. In fact, cannot the State fund and the revenue system supporting it be maintained and used for any purpose, including compensation of damages, and cleanup for which the fund created by H.R. 85 is not available?
>
> Mr. Biaggi. Again, I would say to the gentleman that it is not the intent of H.R. 85 to preempt the States from financing by whatever means they choose those activities which are not compensable under H.R. 85. [2 Legis. Hist. 906-907].

See also the remarks of Representative Livingston to the same effect at 2 Legis. Hist. 919-920.

Both colloquies echo the analysis of the preemption provision contained in an earlier House report on H.R. 85

which noted that, "The States would be prohibited only from duplicating the basic purposes of the Federal fund . . .," 2 Legis. Hist. 532 (H. Rep. No. 96-172, part 1). Moreover, in regard to the language assuring states that they could tax to finance the purchase and installation of pollution abatement equipment, the report stated that, "by singling out this particular State activity as not covered under the preemption subsection, neither the Subcommittee nor the Committee implies or intends to imply that other State actions, not specifically enumerated, are prohibited." 2 Legis. Hist. 533. *See also* 2 Legis. Hist. 562-563 (H. Rep. No. 96-172, part 1).

From all of the above comments, it is clear that the preemption provisions in H.R. 85 were intended merely to prevent the states from duplicating what was envisioned to be a comprehensive federal spill fund—comprehensive, that is, within the scope of its coverage. The House recognized, however, that even the program it envisioned in H.R. 85 would not address all of the kinds of damage resulting from spills, and thus contemplated that States would levy taxes to cover areas excluded from the proposed federal scheme. Moreover, although the House specifically included a disclaimer in the preemption sections of H.R. 85 allowing states to impose taxes for the purchase and positioning of pollution abatement equipment, this provision was intended to be illustrative of the acceptable uses of a state tax, and was not the only purpose for which a State tax was authorized.

Since a combination of the liability, insurance, and funding provisions of H.R. 85 was expected to accommodate all future spills in terms of response costs and the specified damages, there appeared to be no need for coextensive state programs. This point was emphasized

during consideration of S. 1341, the bill proposed by the Carter Administration, which also contained a spill program analogous to the coverage provided in H.R. 85. (3 Legis. Hist. 27-60). Under the spill provisions of S. 1341, according to Thomas C. Jorling, Assistant Administrator, Water and Waste Management, EPA, "all spills requiring response would receive it, each spill would be completely cleaned up, and any property damages and limited economic damages . . . would be compensated. For these activities, then, no State authority or funds would be needed."[16] 1 Legis. Hist. 124 (written statement of Mr. Jorling submitted to the Subcommittee on Environmental Pollution and Resource Protection, Committee on Environment and Public Works). Mr. Jorling also noted, however, that the spill portions of S. 1341 would preempt a state from establishing a fund "which would duplicate the purposes of the legislation but it does not preempt States for other purposes." 1 Legis. Hist. 112. His views are thus consistent with those of Representatives Biaggi, Florio, and Snyder noted above. *See also* Statement of Swep T. Davis, Associate Assistant Administrator for Water and Waste Management of EPA, recorded in Hearings on S. 1480 before the Senate Committee on Commerce, Science and Transportation, 96th Cong. 2nd Sess. (September 11-12, 1980), Comm. Print at 175.

In contrast to the spill-related preemption provision of S. 1341, another section of that bill expressly narrowed the scope of the spill provision and also disavowed any

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[16] The preemption provision of S. 1341 was contained in § 612 and used language similar to that included in H.R. 85. S. 1341 provided in pertinent part that, "no person may be required to contribute to any fund, the purpose of which is to pay compensation for such a loss or cost [described in subsection (a) of section 607 of this title] . . . 3 Legis. Hist. 57.

preemptive intent in regard to abandoned hazardous waste sites:

> Nothing in subsection (a) of this section shall preclude or be interpreted to preempt any State from establishing liability funds, establishing limits of liability, setting financial responsibility requirements, or imposing any taxes or fees upon any person, or upon oil or hazardous substances for the purpose of establishing liability and compensation schemes for losses or costs not compensated under this title which are associated with pollution, or for any losses or costs associated with releases of hazardous substances as defined in section 601(o)(3) at uncontrolled hazardous waste disposal sites. [§ 612(b), reprinted at 3 Legis. Hist. 57].

No preemption was proposed for abandoned sites because "The legislation focuses Federal assistance on those sites presenting the most serious public health, safety or environmental problems: the States would have the responsiiblity for remedying the problems caused by the vast majority of the remaining inactive and abandoned sites." Jorling Statement, *supra,* 1 Legis. Hist. 109-110. Due to the limitations of the federal program for abandoned sites, therefore, "the Administration felt that preemption would neither be equitable nor in the best interests of public health and environmental protection." *Ibid.* at 124. *See also* Davis comments, *supra,* Comm. Print at 175 (no preemption in regard to state taxation to remedy abandoned sites because "we need that State program as a complement to this program.")

Congress at first agreed with the Administration that there should be no preemption of state taxation in the abandoned site area. Neither H.R. 7020 nor S. 1480 which both addressed the abandoned site problem contained any restriction on state taxation. *See* H.R. 7020 as passed by the House, 2 Legis. Hist. 391-463; S. 1480 as reported, 1

Legis. Hist. 462-552. In August 1980, however, two amendments containing preemption provisions were proposed for addition to S. 1480—one by Senator Magnuson and the other by Senator Gravel. Both of these amendments proposed adding an oilspill title to S. 1480 and limited preemption to the oilspill context. They thus were consistent in concept with the approach taken earlier by Congress and the Administration which preempted state taxation to the extent of federal coverage in the oilspill area, but rejected preemption in regard to abandoned sites.[17]

On September 24, 1980, however, Senator Cannon proposed a number of amendments to S. 1480 reflecting concerns raised in hearings before the Commerce Committee. 3 Legis. Hist. 178-179. *See also* Hearings on S. 1480 before the Senate Committee on Commerce, Science and Transportation, 96th Cong., 2nd Sess. (September 11-12, 1980), Comm. Print. Due to the extremely tight timeframe, the amendments had not been considered in committee session. 3 Legis. Hist. 178. Senator Cannon, on behalf of the Commerce Committee, thus invited comments on the amendments. *Ibid.* Included in the group of 15 amendments was No. 2387 which proposed some limitations on state taxation:

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[17] The Magnuson Amendment (No. 1958) is reprinted at 3 Legis. Hist. 70-113. In regard to preemption, § 15(a) of the amendment provided in pertinent part that, "No person may be required to contribute to any fund, by any Federal, State, or other law, the purpose of which is to pay compensation for any loss which may be compensated under this title." *Ibid* at 107. The Gravel Amendment (No. 1965) is reprinted at 3 Legis. Hist. 114-150. Its preemption provision was sweeping in scope, stating that "States are hereby precluded from: 1) the imposition of excise taxes or fees upon oil for purposes of financing activities *related to* the cleanup of discharges and the payment of damages caused by discharges." *Ibid.* at 142 (emphasis added).

Sec. 8(a) Except as provided in this Act and subject to the provisions of subsection (b) of this section—

(1) No action may be brought in any court of the United States, or of any State or political subdivision thereof, for costs or damages for which a claim may be asserted under this Act, and

(2) No person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for such costs or damages, nor to establish or maintain financial responsibility relating to the satisfaction of a claim for such costs or damages: provided, however, that nothing in this subsection shall preclude any State from imposing a tax or fee upon any person or upon any hazardous substance in order to finance the purchase or pre-positioning of hazardous substance release cleanup equipment or other preparations for the cleanup of a release of hazardous substances which affects such State.

(b) Nothing in subsection (a) shall preclude or be interpreted to preempt any State from establishing liability funds establishing limits of liability, setting financial responsibility requirements, or imposing any taxes upon any person, or upon oil or hazardous substances for the purpose of establishing liability and compensation schemes for losses and costs associated with releases of hazardous substances at any closed hazardous waste disposal facility. [3 Legis. Hist. 185-186].

Although the precise impact of this language when viewed against the federal coverage proposed in S. 1480 is far from clear, Senator Cannon intended it to be consistent with both S. 1341 and H.R. 85. Explanation to Amendment No. 2387, reprinted at 3 Legis. Hist. 186. In keeping with this intent, the explanation accompanying the amendment stated that, "The amendment would expressly not prevent the states from providing remedies for damages not covered by S. 1480. In addition, states would specifically retain their authority to impose taxes or fees for the purchase of cleanup equipment." *Ibid.* The thrust of the Cannon Amendments was thus to prevent overlapping, duplicative, and unnecessary state programs. *Ibid.*

Following the presidential election in November 1980, the Senate stepped up its efforts to adopt some form of Superfund bill before the end of the lame duck session. 1 Legis. Hist. VII. A group of senators led by Senators Randolph and Stafford, the ranking members of the Senate Committee on Environment and Public Works, introduced their first compromise measure on November 18, 1980. 3 Legis. Hist. 199-287. This proposal contained a substitute to S. 1480 that combined those parts of H.R. 85, H.R. 7020, and S. 1480 where the senators believed that consensus existed. Of particular note is that the first substitute was silent in regard to state taxation. The only mention of preemption was contained in § 114(a) of the substitute which assured states that they would not be preempted from "imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 3 Legis. Hist. 275.

When this substitute measure failed to yield the expected consensus, however, Senators Stafford and Randolph introduced a second proposal. 1 Legis. Hist. 560-680. It was this second substitute to S. 1480, introduced on November 24, 1980, and passed by the Senate on that same day, which eventually became CERCLA. 1 Legis. Hist. VII. In regard to preemption, the compromise retained § 114(a) from the first Stafford/Randolph substitute, thus allowing states to impose additional liability and other requirements regarding releases of hazardous substances. 42 *U.S.C.* § 9614(a). This provision represented a rejection of the Cannon proposal which had restricted a state's options in this area. *See* Amend. No. 2387, reprinted at

3 Legis. Hist. 185-186. The Act did prevent states from imposing financial responsibility requirements, however, thus accepting the Cannon proposal in this regard. *Ibid.* *Compare* 42 *U.S.C.* § 9614(d). Finally, the compromise did contain the language in issue here—42 *U.S.C.* § 9614(c)—which obviously represented an accommodation between those legislators who opposed the preemption of state taxation altogether, and those like Senator Cannon and the supporters of H.R. 85 who supported some limitations on state taxation.

In preempting state taxation only to the extent that such taxes would be used to finance "claims which may be compensated under this subchapter," however, Congress linked preemption to the coverage provided by CERCLA, paralleling the thrust of the preemption provisions proposed earlier in H.R. 85. Despite this parallel, though, the preemption effected by 42 *U.S.C.* § 9614(c) was even less onerous than what had been proposed earlier in the oil-spill context because—unlike H.R. 85—CERCLA was not intended to cover all "compensable damages" including removal costs associated with future spills, but was designed to address only those releases (including abandoned waste sites) that qualified for national priority status. *Compare* the priority focus of CERCLA, 42 *U.S.C.* § 9605(8), with § 104(f) (1) of H.R. 85 which made the fund liable for all removal costs and specified damage claims resulting from a spill (2 Legis. Hist. at 1031 and 1104). Since CERCLA left far more to the states to cover on their own than H.R. 85 had left, therefore, the preemption accomplished by 42 *U.S.C.* § 9614(c) was correspondingly narrower. Moreover, by choosing "may be compensated" over other proposed formulations such as "may be asserted," Congress prevented the use of state funds only for those

claims that had a realistic chance for Superfund compensation and not from financing all claims that conceivably could be raised under CERCLA.

As incorporated in the Superfund Act, then, 42 *U.S.C.* § 9614(c) became an incentive to states to participate fully in the federal cleanup program for priority sites. If states maximized their use of Superfund, they could maintain their own funds supported by state taxes to supplement the federal program. Should states wish to start a competing and duplicative program for priority sites, however, 42 *U.S.C.* § 9614(c) would require such programs to be financed by general revenues.

The legislative history recounted above demonstrates that Congress fully intended to allow states to impose special taxes to supplement federal cleanup efforts. For it simply made no sense in the context of H.R. 85, and makes no sense in the context of CERCLA, to preempt state taxation for needed cleanup efforts and damage compensation that would not be addressed by the federal program.

The limited nature of the preemption accomplished by 42 *U.S.C.* § 9614(c) was confirmed in the Bradley/Randolph colloquy quoted above at pp. 10-11, reprinted at 1 Legis. Hist. 731-733. A close examination of the colloquy reveals substantial similarities to the exchange of remarks that took place earlier between Representatives Biaggi and Florio in regard to the preemption provisions of H.R. 85. Compare 1 Legis. Hist. 731-733 with 2 Legis. Hist. 903-905. Both colloquies demonstrate that continued state taxation was contemplated, and that preemption was intended to reach only to the extent of federal coverage of the problem areas sought to be remedied by the legislation. In Senator Randolph's words, "Any damage not reimbursed by this

bill fund may similarly be the proper subject of a State fund if a State so chooses to construct its fund." 1 Legis. Hist. 732.

The Bradley/Randolph colloquy did establish that there would be no preemption whatsoever of state fund moneys collected prior to the effective date of the legislation. 1 Legis. Hist. 732. Contrary to Exxon's assertions, however, the colloquy also addressed the permissible scope of state taxation *after* the adoption of CERCLA. That this is so is clear from Senator Bradley's question concerning the propriety of using state funds to finance response activities up front in the absence of federal action, and then seeking reimbursement from the federal fund:

> Mr. BRADLEY. In the event I have described, where a State or a contractor of the State is the respondent to the release and incurs economic loss normally compensable under the provisions of this bill, does this legislation intend that *a State that has continued to collect taxes or fees to finance a State fund designed to cover expenses and economic loss not covered under the provisions of this bill* have the right to use those State fund moneys to provide intermediate, up front capital to pay for these activities and seek reimbursement from the fund established under this bill?
>
> Mr. RANDOLPH. Nothing in the language or intent of this bill would prohibit a State from using its fund for the purposes you have inquired about. . . . [1 Legis. Hist. 732, emphasis added].

Moreover, since the colloquy had already established that there was no preemption at all for state taxes collected prior to the adoption of CERCLA, the following statement obviously refers to the collection of state taxes after the enactment of CERCLA:

> Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?
>
> Mr. RANDOLPH. That is correct. [1 Legis. Hist. 733].

Similarly, the remarks confirming the use of state funds to provide the state share of remedial costs and to complete cleanup efforts terminated by the federal government also referred to funds supported by state taxes levied subsequent to the adoption of CERCLA. *Ibid.* Exxon's interpretation of the colloquy which limits it to the use of state taxes collected before the enactment of CERCLA is just plain wrong. As the above excerpts indicate, the colloquy supports New Jersey's interpretation of 42 *U.S.C.* § 9614(c). *See also* the comments of Representative Florio concerning the preemption provision during House debate on CERCLA, 1 Legis. Hist. 780 ("while States may not create duplicate funds to pay damages compensable under this bill, there is no preemption of the State's ability to collect taxes on fees for other costs associated with releases that are not compensable damages as defined in this legislation. It is also intended that state funds can be used to provide the required 10-percent State match.")

Both Houses of Congress have recently reconfirmed the construction of 42 *U.S.C.* § 9614(c) contained in the Bradley/Randolph colloquy and endorsed by the courts below. In considering legislation to reauthorize Superfund, the Senate Committee on Environment and Public Works has proposed an amendment to 42 *U.S.C.* § 9614(c) to clarify the "original intent of the provision." Superfund Amendments of 1984, Sen. Rep. No. 98-631, 98th Cong., 2nd Sess. (September 21, 1984), Comm. Print at 35-36 and 245. As noted in the Committee Report:

> The addition makes clear that in no way are States prohibited from using special taxes to raise their own funds if the funds are expended for costs at Superfund sites under section 104(c)(3). . . . It also includes the costs of responses supplemental in number or degree to those taken under the Fund. State management activities for hazardous substance programs would also be appropriate. [*Ibid.* at 36].

This clarification was deemed necessary by the Committee to clear up "[a]ny cloud of uncertainty over the legitimacy of" state taxes that had been prompted by the instant litigation. *Ibid.* A similar need to clarify existing law was perceived in the House where the Committee on Energy and Commerce has noted that, "The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund." Superfund Expansion and Protection Act of 1984, H. Rep. No. 98-890, Part 1, 98th Cong. 2nd Sess. (July 15, 1984), Comm. Print at 58-59.

Although post-enactment legislative history such as these recent committee reports may not be as persuasive as contemporaneous legislative history, post-enactment history is nonetheless entitled to "significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 *U.S.* 572, 596 (1980). *See also Bell v. New Jersey*, 461 *U.S.* 773, 784-785 (1983). Certainly, the consideration of these reports is in keeping with this Court's desire to review all material relevant to the task of ascertaining legislative intent. *See Watt v. Alaska, supra*, 451 *U.S.* at 265-266; *Andrus v. Shell Oil Co., supra*, 446 *U.S.* at 666. The fact that the post enactment history refers to the instant controversy contributes rather than detracts from the weight that should be

accorded to the reports because the reference makes clear that Congress knew about the dispute and sought to clarify any misinterpretation of its original intent in adopting 42 *U.S.C.* § 9614(c). *See generally North Haven Bd. of Ed. v. Bell*, 456 *U.S.* 512, 535 (1982) (congressional awareness of dispute as reflected in post-enactment developments lends weight to interpretation of statute endorsed by Court).

Both the contemporaneous and subsequent legislative history thus support the conclusion reached below that New Jersey may continue the Spill Fund tax to finance costs not covered or actually compensated by Superfund. To fulfill the will of Congress, therefore, this Court should affirm the judgment of the New Jersey Supreme Court.

Before concluding, however, some mention must be made of the interpretation of 42 *U.S.C.* § 9614(c) urged by the Solicitor General. The Solicitor General focuses on the definition of "claim" contained in CERCLA which means "a demand in writing for a sum certain." 42 *U.S.C.* § 9601(4). Since governmental response costs are distinct from claims on both the federal and State level because they are paid directly from the trust funds established for this purpose without resort to the claims process established in both pieces of legislation, the Solicitor General concludes that governmental response costs are completely beyond the preemptive scope of 42 *U.S.C.* § 9614(c). *See* 42 *U.S.C.* § 9611(a) in which the payment of governmental response costs is explicitly distinguished from the payment of claims; *compare* the claims processes in 42 *U.S.C.* § 9612 and *N.J.S.A.* 58:10-23.11k through *N.J.S.A.* 58:10-23.11q which were not intended to be used for governmental re-

sponse costs.[18] Although this use of the "claims" language differs from New Jersey's reading of 42 *U.S.C.* § 9614(c), it certainly is feasible and is consistent with New Jersey's interpretation to the extent that both are in keeping with the narrow scope of preemption envisioned by Congress and discussed above.

Insofar as third-party damage claims are concerned, however, the Solicitor General finds this area totally preempted by 42 *U.S.C.* § 9614(c). For example, under the Solicitor General's reading, a nongovernmental party who cleans up a site could not be compensated by a state fund even if the cleanup was either not eligible for federal compensation (*e.g.*, site not on NPL), or if the request for reimbursement had been rejected by EPA. Similarly, states would be precluded from financing third-party claims for damage to natural resources, even though CERCLA specifically limits such claims to governmental entities. 42

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[18] The structure of both the federal and New Jersey acts demonstrates that governmental response costs were not meant to go through the claims process. In regard to CERCLA, Congress has noted that governmental response costs were not subject to the procedures for claimants seeking third party damages and response costs since such a process would preclude timely governmental response. 1 Legis. Hist. 371 (Sen. Rep. No. 96-848). Similar reasoning applies to the Spill Act. Moreover, the Superfund program in regard to response costs operates in conjunction with the states through cooperative agreements and contracts, not through claims. 42 *U.S.C.* § 9604(c) (3). States thus agree to pay their percentage of remedial costs up front and do not as a matter of course file claims for response costs against Superfund. Finally, the federal program utilizes these up front funding guarantees from the states and does not operate on a reimbursement basis so that states typically do not file claims for the reimbursement of moneys already expended.

U.S.C. § 9607(f).[19] Such a construction is at odds with the language of 42 *U.S.C.* § 9614(c) and the legislative history recounted above which demonstrates that Congress clearly contemplated that states would use their own tax-supported funds to fill in those areas either not covered or not actually compensated by Superfund. In keeping with this legislative history and the language of the statute, New Jersey reads "which may be compensated under this subchapter" to modify the entire phrase, "claims for any costs of response or damages or claims." While this reading may not reflect the best grammatical usage, those engaged in statutory construction should avoid both scholastic strictness and making "a fortress of the dictionary." *See Watt v. Alaska, supra,* 451 *U.S.* at 266, citing *Cabell v. Markham,* 148 *F.*2d 737, 739 (2d Cir. 1945) (L. Hand, J.), aff'd 326 *U.S.* 404 (1945). As this Court recently observed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 104 *S.Ct.* 2778, 2791 (1984), "We are not persuaded that parsing of general terms in the text of the statute will reveal an actual intent of Congress." When the Court looks for "that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested," *C.I.R. v. Engle,* 464 *U.S.* 206, 217 (1984), quoting *NLRB v. Lion Oil*

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[19] In the course of developing the compromise that became CERCLA, coverage for damages was severely restricted. As enacted, CERCLA provides no compensation for property damage or medical injuries, only damage to natural resources incurred by governmental entities. Consequently, the definition of "damages" was restricted to mean "damages for injury or loss of natural resources. . . ." 42 *U.S.C.* § 9601(6).

Co., 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part), New Jersey submits that its interpretation of 42 *U.S.C.* § 9614(c) is the only proffered construction to meet this criteria. The State thus urges the Court to affirm the judgment below.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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